No. 80-996

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

BARBARA McGINLEY,

Petitioner,

against

CHARLES J. HYNES, Deputy Attorney General of the State of New York,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement of the Case

Respondent Hynes was, at the time this action arose, a Deputy Attorney General of the State of New York, authorized by the Governor and the Attorney General to investigate the alleged commission of various indictable offenses by the State's hospitals, their principals, agents and suppliers (23a-25a).** Pursuant to this authority, respondent

* The petition is so entitled. Respondent was succeeded by Edward J. Kuriansky on December 8, 1980, prior to filing.

** Page references are to the appendices to the petition for certiorari.

initiated an investigation before a September 1978 Grand Jury into possible kickback and rebate schemes involving Medicaid fraud at the Brunswick Hospital Center, a general hospital located in Suffolk County, New York (3a). The inquiry was precipitated by what the New York State Court of Appeals called "some rather unusual business transactions between Brunswick and two of its regular suppliers" (*id.*).

The term of that Grand Jury expired nine months later, on June 22, 1979, when its members rejected the prosecutor's request that the Grand Jury seek a further extension from the empanelling court in order to complete the investigation (5a). This refusal, the Court of Appeals concluded, was based "not upon [the Grand Jury's] belief that no crime had been committed, but, rather, upon the Grand Jurors' impatience with the repeated delays occasioned by the witnesses' recalcitrance" (id). The court noted that the investigation had been "plagued with delays" from its inception, being repeatedly obstructed by witnesses who refused to appear or to produce documentary evidence when subpoenaed; and that this pattern of "dilatory tactics" by the hospital, its suppliers and their lawyers not only prevented the Grand Jury from taking any action in the matter, but even confounded the efforts of the trial judge to conduct contempt proceedings against the recalitrant witnesses (3a-5a).

A new Grand Jury was convened in October of 1979 in an effort to acquire and evaluate the evidence which the initial panel did not reach (5a). Shortly thereafter, petitioner Barbara McGinley, an employee of the hospital, brought a civil proceeding in the Supreme Court, Suffolk County, a state court of original jurisdiction, to prohibit

the continuation of the investigation by the successor Grand Jury on the theory that the failure of the prior panel to return any indictment was equivalent to a dismissal of all potential charges against the hospital and its employees and suppliers; arguing that resubmission of these charges to the successor Grand Jury without a court order violated section 190.75, subd. 3, of the New York Criminal Procedure Law (6a). That statute requires judicial authorization for the resubmission of "dismissed" charges to the same or a successor Grand Jury. Under the statute, a dismissal is a finding by the Grand Jury that, upon a charge that a designated person committed an offense, either (a) the evidence was not legally sufficient, or (b) that it did not establish reasonable cause; such a finding must be filed by the foreman with the empanelling court (CPL § 190.75, subd. 1). Petitioner, however, urged that the first Grand Jury's nonaction was the functional equivalent of a dismissal and sought to enjoin all the proceedings before its successor (6a). The petition was brought pursuant to Article 78 of the New York Civil Practice Law and Rules, which codifies the common law writs of prohibition and mandamus (CPLR § 7801).

The petition was dismissed by the Suffolk County Supreme Court on the ground that Article 78 was an extraordinary procedure which did not lie to enjoin the Grand Jury's investigation (20a). The Appellate Division, Second Department, reversed and granted the writ, without discussing the procedural question, on the ground that the investigation had been substantially concluded before the original Grand Jury and that a court order authorizing resubmission was therefore required, citing section 190.75 (15a-18a). The New York Court of Appeals, however, re-

versed the Appellate Division, without reaching the merits of petitioner's contention, solely "because we conclude that prohibition does not lie under circumstances such as these" (7a). The Court of Appeals held that so long as the prosecutor and the Grand Jury were performing a "purely investigative function," they were not subject to prohibition under Article 78; the Court interpreted Article 78 as being available only to challenge "quasi-judicial," as opposed to "executive," acts and determinations (7a-11a). It held that petitioner's remedy, if any, lay through other available procedures (11a).

Petitioner then moved for reargument before the Court of Appeals, seeking to raise, for the first time, two federal constitutional issues. She contended, first, that "procedural due process" guaranteed a right to seek prohibition against a Grand Jury allegedly operating improperly or illegally; and, second, that due process required judicial authorization for resubmission of charges "in all cases"—thereby arguing, in effect, that section 190.75, upon which she had originally relied, was unconstitutional in requiring judicial permission only where a dismissal had been filed. In the alternative, petitioner requested an amendment of the remittitur to recite that the procedural due process had been considered by the Court and for a stay pending certiorari proceedings. The Court of Appeals denied reargument and refused to amend the remittitur or to grant the stay (1a).

Reasons for Denying the Writ

A. No constitutional issue was passed upon by the New York courts.

Despite the clear mandate of Rule 21.1(h), petitioner has not even attempted to show that the federal issue she now seeks to argue was "timely and properly" raised in the State courts. This is not surprising. As the opinions by all three New York Courts clearly show, no federal constitutional issue was ever considered by any of them. Indeed, the federal constitution was not even invoked until after petitioner lost in the Court of Appeals and that Court, evidently adhering to its long-standing policy of not permitting constitutional issues to be raised for the first time at that level, *DiBella* v. *DiBella,* 47 N.Y.2d 828, 39 N.E.2d 564, 418 N.Y.S.2d 577 (1979), refused to entertain reargument to consider the claim. Equally significantly, it simultaneously denied petitioner's motion to amend the remittitur to recite that a constitutional issue had been passed upon. It would be manifestly improper to permit such an issue to be raised for the first time in this Court. *Ellis* v. *Dixon,* 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231, *reh. denied,* 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed. 759 (1955).

B. This is an inappropriate case in which to reconsider *United States* v. *Thompson.*

Petitioner seeks certiorari to have the Court reconsider, and presumably reverse, its decision in *United States* v. *Thompson,* 251 U.S. 407, 40 S.Ct. 289, 64 L.Ed. 333 (1920), holding that representation of a case to a successor grand jury does not require judicial permission. The Court held that the powers of the district attorney and Grand Jury

were unfettered in this regard, agreeing with the Government's analysis "of the common law, of the stautory law of the United States, of the practices from the beginning, and of the adjudications of this court which settle the question." *Id.* at 413, 40 S.Ct. at 292, 64 L.Ed. at 342.* As petitioner concedes, "This ruling has been followed, without question," for sixty years (petition at 9). *E.g., United States* v. *Barone,* 584 F.2d 118, 123 (6th Cir. 1978), *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1019, 59 L.Ed.2d 73 (1979); *United States* v. *Kysar,* 459 F.2d 422, 423 (10th Cir. 1972). But even if *Thompson* were ripe for reconsideration, this clearly would not be an appropriate case in which to reconsider it.

In the first place, the Court cannot logically reach the issue unless it first holds that the New York Court of Appeals acted unconstitutionally in requiring petitioner's challenge to be raised in an action other than an Article 78 proceeding. *Cf. Ellis* v. *Dixon, supra.* This Court has never implied that there is any constitutional infirmity in the long-recognized principle that an extraordinary writ does not lie when there is a conventional remedy at law. *See, e.g., Helstoki* v. *Meanor,* 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979). The claim that "procedural due process" requires that a writ of prohibition be available to petitioner is not even pressed in the current petition. And even if the Court were to so hold, the proper remedy would be to then remand so that the New York Court of Appeals could consider, for the first time, the merits of the petition —

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* Thompson's arguments had been based upon an exception under Pennsylvania law, and thus the Court did not explicitly address the constitutionality of the prevailing rule. *Thompson* has since been viewed, however, as tacitly sustaining the constitutionality of federal practice. *Cf. United States* v. *Atlantic Commission Co.,* 45 F.Supp. 187, 191 (E.D.N.C. 1942).

which it could well resolve on non-constitutional grounds such as standing (*see* 12a) or the statutory interpretation adopted by the Appellate Division.

In the second place, this is, as the Court of Appeals noted, not a case in which the prosecutor has attempted to resubmit "specific charges against a particular, named defendant to a second Grand Jury after a prior Grand Jury has voted to dismiss or has been discharged without taking any action on the charge" (12a). Any reassessment of *Thompson* on the theory that it permits predatory "forum shopping" or "harassment" (petition at 10) would logically begin under those facts. Here, by contrast, there is a clear finding that the investigation was frustrated, before charges could be formulated or the evidence fully explored, by the improper, and frequently illegal, dilatory tactics deliberately engaged in by the targets. The viability of *Thompson* in this situation can scarcely be questioned.

C. The case is likely to become moot.

After the Court of Appeals vacated the writ of prohibition in October of 1980, the current Grand Jury promptly resumed its investigation. On December 22, Associate Justice Marshall, as Circuit Justice, denied a stay notwithstanding petitioner's plea that without one "the petition will be academic and become moot" (letter to Justice Marshall, Dec. 16, 1980). Although it is too soon to predict exactly when the Grand Jury's investigation will be concluded, respondent agrees that it is at least very likely to terminate before this case can be briefed, argued, and decided. *DeFunis* v. *Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974).

Conclusion

Certiorari should be denied.

Respectfully submitted,

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